

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Original

~~740-1279~~

75-7027

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT W. MC CUNE,

Plaintiff-Appellee,

— against —

LOUIS J. FRANK, Commissioner of Police of the County of
Nassau and the POLICE DEPARTMENT OF THE
COUNTY OF NASSAU,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NEW YORK

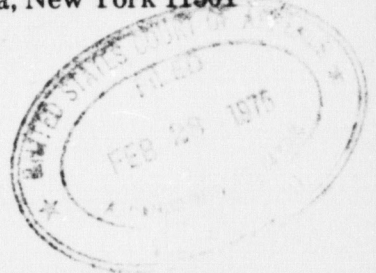
BRIEF FOR DEFENDANTS-APPELLANTS

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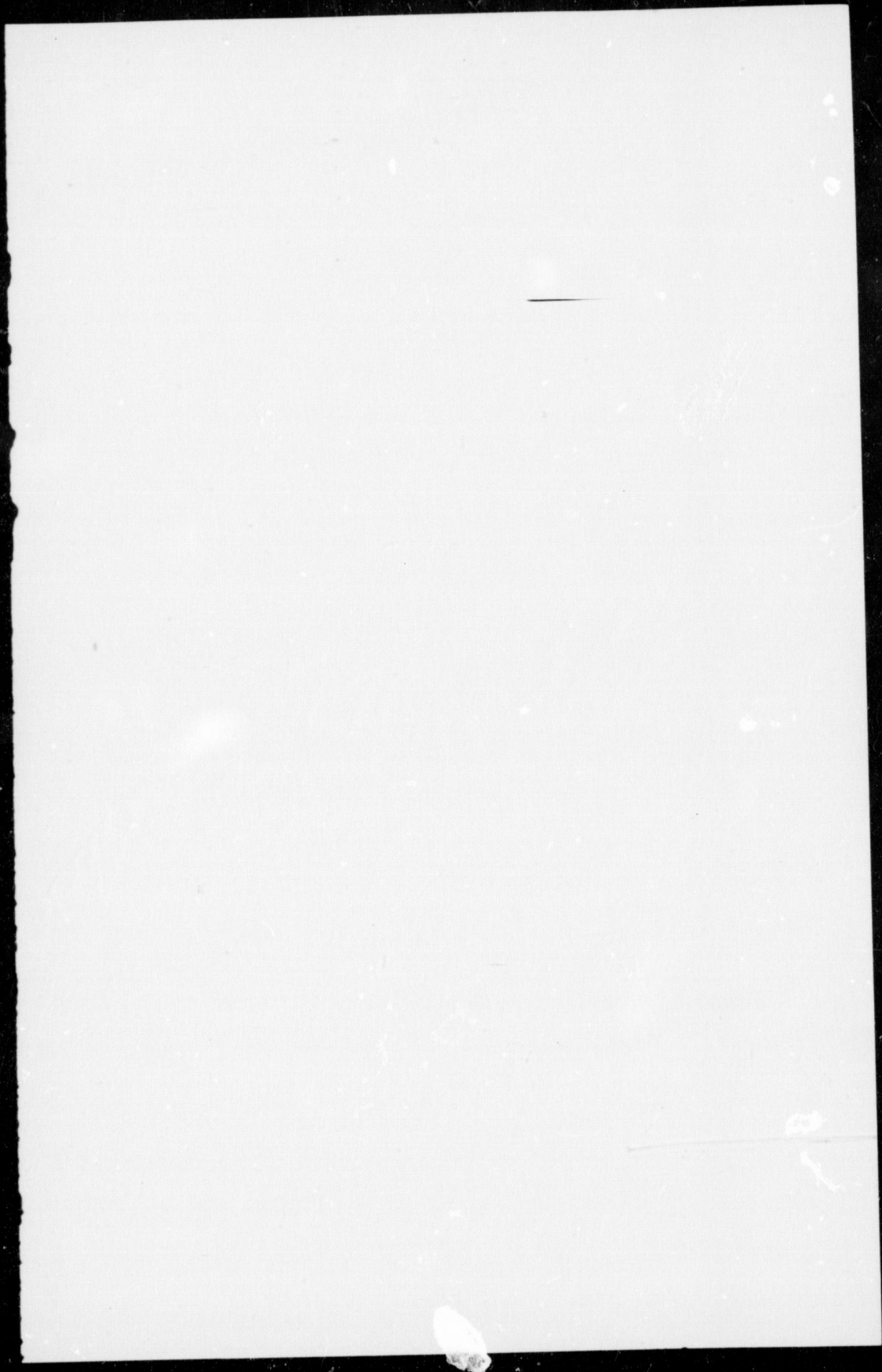


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FOR THE SECOND CIRCUIT

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
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BRIEF FOR DEFENDANTS-APPELLANTS

Questions Presented

1. Must the Federal District Court accord full faith and credit to a judgment entered by a state court of competent jurisdiction, thus precluding relitigation in the federal system?

The Court below did not pass on this question.

2. Is plaintiff-appellee's suit barred because of *res judicata*?

The Court below answered in the negative.

3. Have defendants-appellants failed to establish a legitimate state interest in the grooming standards set

forth in Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department?

The Court below answered in the affirmative.

Statement of the Case

Plaintiff-appellee obtained an order to show cause on the 5th day of September, 1974, signed by United States District Court Judge Leo F. Rayfiel, ordering that the defendants be enjoined temporarily from enforcing Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department and the defendants were further temporarily enjoined, pending a hearing and determination, from prosecuting the plaintiff-appellee pursuant to the Nassau County Police Department's procedure for a violation of Article VIII, Rule 22, of the Rules and Regulations of the Nassau County Police Department, for a violation thereof.

On or about September 5, 1974, plaintiff-appellee filed a complaint in an action for a declaratory judgment against defendants-appellants herein. In his complaint, plaintiff-appellee alleges that on or about July 5, 1974, he was personally served with a copy of Charges and Specifications which alleged in substance that on May 14, 1974, plaintiff-appellee did wear his sideburns extending below the mid part of his ears, to wit, the lower edge of his ear lobe and then flared out to a width of about at least one and one-quarter inches, thereby violating Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department.

On July 16, 1974, the plaintiff-appellee entered a not guilty plea and a trial date was set for September 17, 1974.

Plaintiff-appellee alleges in his complaint that Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department violate his constitutional

guarantees set forth in the United States Constitution, as well as being in direct violation of Title 42 of the United States Code, Section 1983.

In addition, plaintiff-appellee further alleges that compliance by the defendant-appellant, Louis J. Frank, with Section 75 and 76 of the Civil Service Law of the State of New York with respect to the appointment of police trial commissioners allegedly results in the appointment of trial commissioners who are directly beholden to said defendants-appellants and that an impartial trial cannot be conducted. Plaintiff-appellee, alleges that this procedure violates his due process guarantees under the Fifth and Fourteenth Amendments of the United States Constitution.

Plaintiff-appellee requests a declaration that Article VIII, Rule 22, as amended, of the Rules and Regulations of the Nassau County Police Department be declared unconstitutional and, therefore, null, void and invalid, and that the defendant-appellant, Louis J. Frank, Commissioner of Police of Nassau County, be restrained from promulgating and enforcing other similar such rules and regulations which are allegedly contrary to the alleged constitutional rights of members of the Police Department.

Defendants-appellants on or about the 6th day of September, 1974, filed an affidavit in opposition to the aforementioned order to show cause. The substance of this affidavit in opposition by Senior Deputy County Attorney Louis Schultz is that the doctrine of *res judicata* or collateral estoppel precludes the instant plaintiff-appellee from continuing with this litigation since the previous determinations prevent the parties to an action and those in privity with them from subsequently relitigating these questions that were previously decided. This affidavit by defendants-appellants reaffirms the constitutionality of Sections 75 and 76 of the Civil Service Law of the State of New York. Defendants-appellants further requested that the stay be vacated and that the complaint of the plaintiff-appellee be dismissed on the grounds of *res judicata*.

Shortly thereafter, on September 16, 1974, the case at bar came before United States Chief Judge Jacob Mischler. Judge Mischler denied defendants-appellants' request for dismissal on the grounds of *res judicata* and found that the issue of the violation of the plaintiff-appellee's constitutional rights had not been adjudicated (A. 72).^{*} The court instructed Mr. Schultz to come forward with proof necessary to establish a legitimate state interest in order to uphold the validity of Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department. The hearing was concluded on October 25, 1974 and Judge Mischler reserved decision.

On December 13, 1974, Chief Judge Jacob Mischler rendered a memorandum decision which denied the application of the doctrine of *res judicata* to the case at bar and held that the defendants-appellants failed to establish a legitimate state interest for the grooming standards as set forth in Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department and granted judgment in favor of the plaintiff-appellee against the defendants-appellants, declaring Article VIII, Rule 22 unconstitutional, void and of no effect and permanently enjoining the defendants-appellants from enforcing same. A judgment was entered on December 18, 1974, signed by Chief Judge Mischler, which declared Article VIII, Rule 22 unconstitutional, null and void and permanently enjoined the defendants-appellants from enforcing the same.

On or about December 18, 1974, defendants-appellants served a notice of appeal from this judgment.

POINT I

The judgment of the Court below should be reversed due to the requirements of *full faith and credit*.

The law is clear that if an issue is argued before a state tribunal, its resolution at that level carries with it all the usual effects of *res judicata* required by *full faith and credit*.

^{*}(A — refers to pages in the Appendix, unless otherwise noted.)

28 U.S.C.A. §1738 states in part:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

In *Thistlethwaite, et al. v. City of New York, et al.*, 362 F. Supp. 88 (S.D.N.Y. 1973), *aff'd*, 497 F. 2d 339 (1974), the District Court stated:

"It is clear that a judgment entered by a state court of competent jurisdiction must be accorded full faith and credit by federal courts and that determinations made by a state court can, under controlling principles of *res judicata* and collateral estoppel, preclude relitigation in the federal system. *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231 (1932); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *see generally*, Comment, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 52 Va. L. Rev. 1360 (1967). This applies even to state determinations of fact which, if binding, limit the ability to pursue federal constitutional rights in federal court. *See Taylor v. New York City Transit Authority*, 433 F. 2d 665 (2d Cir. 1970); *Kabelka v. City of New York*, 353 F. Supp. 7 (S.D.N.Y. 1973); *Palma v. Powers*, 295 F. Supp. 924 (N. D. Ill. 1969).

"Even though the United States Constitution may, in the public mind, be associated with federal courts, the trustees charged with preserving and applying the federal constitution include in their number state judges as well as federal judges. *See Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); H. Friendly, *Federal Jurisdiction: A*

General View 90 (1973). Accordingly, state court rulings on federal constitutional issues cannot be collaterally challenged by the parties to the state action in civil rights actions in federal district court, *Bricker v. Crane*, 468 F. 2d 1228, 1231 (1st Cir. 1972); the federal court is without jurisdiction to hear constitutional cases already adjudicated by the state courts. *Paul v. Dade County*, 419 F. 2d 10 (5th Cir. 1969), cert. denied, 397 U.S. 1065, 90 S. Ct. 1504, 25 L. Ed. 2d 686 (1970), noted in 24 U. of Miami L. Rev. 835 (1970).

"Each litigant with at least a colorable constitutional challenge should be accorded his day in court; however, the civil rights statute, 42 U.S.C. §1983, was not designed to sponsor career litigants or to allow duplicative efforts to prevail. *Lackawanna Police Benevolent Association v. Balen*, 446 F.2d 52 (2d Cir. 1971) (*per curiam*). Where a litigant affirmatively decided to launch his constitutional battle in a state civil suit and pursues that battle through the state court system, he has chosen to bypass the opportunity to begin a federal civil rights suit in the district court. *Bricker v. Crane*, 468 F. 2d 1228 (1st Cir. 1972); *P.I. Enterprises, Inc. v. Cataldo*, 457 F. 2d 1012 (1st Cir. 1972); *Lackawanna Police Benevolent Association v. Balen*, 446 F. 2d 52 (2d Cir. 1971) (*per curiam*); *Howe v. Brouse*, 422 F. 2d 347 (8th Cir. 1970); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F. 2d 321 (6th Cir. 1967). This conclusion is required in the interests of judicial husbandry, the policy of comity between federal and state courts, and the equity of protecting opposing parties — usually governmental officials — from vexatious duplicative litigation. See also H. Friendly, *Federal Jurisdiction: A General View* 101-2 (1973)."

362 F. Supp. at 91-2.

The law is clear that when a civil rights action is brought pursuant to 42 U.S.C.A. §1983 in the federal court which presents the same constituted issue as was decided in a prior state civil action, that the prior state judgment has a collateral estoppel or a *res judicata* effect upon the federal suit; and this result may be reached without regard to highly technical notions of mutuality. See *Mastracchio v. Ricci*, 498 F. 2d 1257, 1259-60 (1st Cir. 1974).

The gist of the current suit is an attack on the constitutionality of Rule 22 of Article VIII of the Rules and Regulations of the Nassau County Police Department. This question was at issue and determined against those in privity with plaintiff, McCune in the state courts. This conclusion was reached through a careful analysis of the constitutional issue of the validity of Rule 22 of Article VIII, which was tested in the state courts and was found to be valid and constitutional.

This Court is respectfully referred to *Greenwald v. Frank*, 70 Misc. 2d 632, 334 N.Y.S. 2d 680 (1972), *mod. & aff'd*, 40 A.D. 2d 717, 337 N.Y.S. 2d 225 (2d Dept. 1972), *aff'd no opinion*, 32 N.Y. 2d 862, 346 N.Y.S. 2d 529 (1973), 35 N.Y. 2d 713, 361 N.Y.S. 2d 644 (1974), *motion for reargument dismissed for untimeliness*; and finally, the second *Greenwald v. Frank* case, which was decided by the Appellate Division, Second Department, on February 3, 1975, and published in the New York Law Journal on February 7, 1975, p. 14, cols. 5, 6, 7 and 8.

There is no doubt that the constitutionality of Rule 22 in the state courts was at issue and determined against the plaintiff-appellee or those in privity with the instant plaintiff-appellee in the *Greenwald* decisions. Perusal of the decisions as well as the briefs submitted in the state courts cannot fail to convince this court that the validity of Rule 22 of Article VIII was assailed and decided in the state courts.

In *Wilbert Jackson v. New York City Transit Authority*, 41 A.D. 2d 646 (2d Dept.), *aff'd*, 33 N.Y. 2d 958 (1974), which was a proceeding pursuant to Article 78 of the

CPLR, to review the New York City Transit Authority's determination dismissing Wilbert Jackson. The N.Y. Court of Appeals upheld the hair grooming standards of the NYC Transit Authority. The decision was to the effect that Wilbert Jackson, a New York Transit Authority lieutenant, failed to shave his beard when requested to and was dismissed. The New York Court of Appeals affirmed the determination and dismissed the proceeding. Wilbert Jackson claimed that the dismissal was arbitrary, capricious and a denial of due process of law and equal protection of the law and deprived him of his constitutional right. The Court of Appeals, on the authority of *Greenwald v. Frank*, affirmed the Appellate Division which had affirmed the determination and dismissed the proceeding.

In the learned and scholarly dissenting opinion of Justice Shapiro in the second *Greenwald v. Frank* case, N.Y.L.J. February 2, 1975, p. 14, cols. 5, 6, 7, 8, he concluded that the previous judicial determinations had held the Nassau County Police Department Regulations to wit Article VIII, Rule 22 to be constitutional.

However, that conclusion does not dispose of the problem, for although petitioner cannot use the instant proceeding to review the previous judicial determinations holding the Nassau County Police Department grooming regulations as constitutional, ... N.Y.L.J. 2/7/75 p. 14, col. 8

It is, therefore, clear that any fair analysis of the *Greenwald* cases results in the inescapable conclusion that the issue of the constitutionality of Rule 22 of Article VIII was passed upon in favor of the defendants-appellants herein in the state court decisions and remains binding on this plaintiff-appellee. It is also clear that the assault on Rule 22 by the plaintiff-appellee's was broadly based and broadly considered by the courts. Since the Appellate Division, Second Department, in the second *Greenwald* case, rendered its decision of February 3, 1975, it was, if not actually, constructively, aware of Judge Mishler's

decision in the United States District Court, Eastern District, in the case at bar which was decided on December 13, 1974. Therefore, the state court decisions referred to herein must be given *full faith and credit* in the federal courts and the complaint in the instant matter be dismissed, and this court should reaffirm the concept that the civil rights statute 42 U.S.C.A. §1983 should not be used as a vehicle to challenge state court determinations.

POINT II

Plaintiff-appellee's suit is barred because of *res judicata*.

It is well settled that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end. *Grubb v. Public Utilities Commission*, 281 U.S. 470, 50 S. Ct. 374, 74 L. Ed. 972, (1930); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329, (1940).

The legal prerequisites to the application of the doctrine of *res judicata* are: (1) the existence of a final judgment rendered on the merits; (2) subsequent action between the same parties or those in privity with them; and (3) the presence of the same claim or demand. See *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 47 S. Ct. 600, 71 L. Ed. 774 (1927); *Sayer v. Lindsley*, 391 F. 2d 965 (2d Cir. 1968); *In re Weisbrod & Hess Corp.*, 129 F. 2d 114 (2d Cir. 1942). In the case at bar, it is submitted that all these elements are present and that the doctrine of *res judicata* operates to bind the parties both as to issues actually litigated and determined in the *Greenwald* suit and those which might have been but were not raised and decided. *Cromwell v. County of Sac*, 94 U.S. 351, 24 L. Ed. 195 (1877); *Lawlor v. National Screen Service Corp.*, 349 U.S.

322, 99 L. Ed. 1122, 75 S. Ct. 865 (1954); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1949).

1. Prior Final Judgment on the Merits.

In *Matter of Greenwald v. Frank*, *supra*, the state courts made a prior final judgment on the merits. See *William W. Meed v. Louis Frank, et al.*, U.S. District Court, Eastern District of New York, 73-C-1320, decided February 26, 1974, *affirmed without opinion*, 506 F. 2d 1395 (2d Cir. 1974) on *res judicata* effect.

2. The same Parties or Those in Privity with Them.

The privity of interest necessary to bind a party to the results of a prior proceeding was properly decided in defendants-appellants' favor in the District Court.

3. The Same Claim or Demand.

This prerequisite for applying the doctrine of *res judicata* merely requires that there be an identity of issues or grounds between the first and second actions. See *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 109 F. 2d 623 (5th Cir. 1939) *cert. denied*, 310 U.S. 653, 60 S. Ct. 1101, 84 L. Ed. 1418. The identity of issues outlined in the affidavit of Louis Schultz (A-46-67) in opposition to the Order to Show Cause are present in the *Greenwald* cases. Thus, the state court decision should have been given full *res judicata* effect under the doctrine of *full faith and credit* with respect to the case at bar.

The constitutional issue of the validity of Rule 22 in this case has been fully litigated in the state courts and their decisions must be given *res judicata* effect.

Another facet of this matter is that the judgment in the *Greenwald* case, as modified by the Appellate Division, Second Department, is conclusive and that the District

Court judgment which was filed on December 18, 1974, in the case at bar destroys or impairs the rights or interests of the defendants-appellants herein which were established by the modified judgment in the *Greenwald* case, not only in law, but as a practical effect. *Adley Express Co. v. Corn Exchange Bank Trust Co.*, 99 F. Supp. 401, 410 (S.D.N.Y. 1951).

The Civil Rights Act does not permit a second bite at the cherry. *Howe v. Brouse*, 422 F. 2d 347 (8th Cir. 1970); *Scott v. California Supreme Court*, 426 F. 2d 300 (9th Cir. 1970).

The dissenting opinion of Justice Shapiro in *Greenwald v. Frank*, N.Y.L.J. 2/7/75, p. 14, cols. 5, 6, 7, 8, stated:

"Clearly if petitioner here, after failing to seek review in the Supreme Court of the United States of the above-mentioned decision of our New York State Court of Appeals, had sought to relitigate the same question in the lower Federal courts, he would have been unsuccessful (*Community Action Group v. City of Columbus*, 473 F. 2d 966, 973 [C.C.A. 5th])"

In addition, on the question of *res judicata*, Justice Shapiro further stated:

"It is equally clear that if petitioner had initiated this proceeding purely for the purpose of again testing the constitutionality of the regulation which he attacked in his prior appeal to this court and to our Court of Appeals he would be barred from so doing by the doctrine of *res judicata*. So, for example, in *Matter of State of New York Labor Relations Bd. v. Holland Laundry* (294 N.Y. 480, 493), the court said:

"Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between those

parties, should be closed forever" (see also, *Schuylkill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 306).

Hence petitioner cannot, by means of the instant proceeding achieve an overturning of the prior decision against him by this court and the Court of Appeals."

Appellants contend that the legal principle enunciated in the dissenting opinion of Justice Shapiro is pertinent and meaningful in terms of the import of *res judicata* in the case at bar. However, at this juncture, it should be noted that there is legal disagreement with the lower court's decision; and Mr. Justice Shapiro's dissent in the *Greenwald* case, as it relates to the alleged theory that plaintiff-appellee may raise the issue of whether Rule 22 of Article VIII is being constitutionally applied to him. No cases are cited by Mr. Justice Shapiro to support this contention. It should also be noted that the case at bar does not involve a claim of procedural due process, c.f. *Lombard v. Board of Education of City of New York*, 502 F. 2d 631, 636 (2nd Circuit, 1974).

In addition, the memorandum decision of the District Court in the instant case, dated December 13, 1974, states that *res judicata* does not apply in the case at bar since "there is no identity of issues here; the claim which McCune is asserting was not litigated or determined by any of the prior state court proceedings." (A. 501).

Appellants respectfully disagree with this contention of the District Court in that the constitutionality of Rule 22 was before the state tribunals and was decided on the merits. The Court is respectfully referred to the *Greenwald v. Frank* cases cited *supra*, to *Matter of Cliff W. Schmidt v. Frank*, Index No. 20014/73, Nassau Co. Supreme Court, 2/13/74; and *Schmidt v. Frank*, Civil Action File No. 74C314, E.D.N.Y., 4/23/74, in which Judge Costantino dismissed the *Schmidt* action on the ground that the issues had been fully litigated in the state court in the *Greenwald* action; and the doctrine of *res judicata*, therefore,

precluded *Schmidt* from relitigating the same issues in federal court.

It is submitted that the state judges as well as the federal judges act as trustees charged with preserving and applying the Federal Constitution in cases before them, and that state court rulings on federal constitutional issues cannot be collaterally challenged by the parties so the state action in civil rights actions in federal district court. *Bricker v. Crane*, 468 F. 2d 1228, 1231 (1st Cir. 1972).

POINT III

Plaintiff-Appellee's representative's unrestricted, unreserved, voluntary and full litigated attack in the New York State courts precludes plaintiff-appellee from now relitigating the same issues in the federal courts.

The Supreme Court of the United States, in *England v. Louisiana Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964), enunciated the rule of law that appellant must reserve his rights in the state courts in order to relitigate his federal claims in the federal courts. The court stated, at 375 U.S. 419:

"[W]e see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in *Button*, when we stated that a party elects to forego his right to return to the District Court by a decision 'to seek a complete and final adjudication of his rights in the state courts.' We now explicitly hold that if a party freely and with-

out reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then — whether or not he seeks direct review of the state decision in this Court — he has elected to forego his right to return to the District Court."

It is clear, therefore, that appellant must inform the state court what his federal claims are so that the state court may construe those claims accordingly. Moreover, the *England* case insists that any reservation as to the disposition of federal constitutional claims must be made on the state court record. 375 U.S. at 421. Also see *Lecci v. Cahn*, 493 F. 2d 826 (2d Cir. 1974); *Thistlethwaite v. City of New York*, 362 F. Supp. 88, 92 (1973), *aff'd*, 497 F. 2d 339 (2d Cir. 1974).

In order for *England* to apply, it is not necessary for the litigation to have commenced first in the federal court. The clear intent of this case is not based on where one institutes the action first, but when a litigant does commence the action, that he reserve his rights accordingly. As was stated in *Lecci v. Cahn*, at page 830, "The policy underlying the *England* decision is the avoidance of 'a potential source of friction between the state and federal judiciaries.' 375 U.S. at 419, 84 S. Ct. at 466. The procedure employed here does nothing but exacerbate that relationship."

POINT IV

Defendants-appellants request this Court to reconsider its position in raising of police hair grooming regulations to a substantial constitutional issue.

As stressed in Point I of this brief, defendants-appellants contend that the constitutional issue as to the validity of Rule 22 of Article VIII of the Nassau County Police Department Rules and Regulations was decided on the merits by the New York State tribunals and, therefore, the

federal district court, under *full faith and credit*, was without jurisdiction to hear the question of the constitutionality of Rule 22 of Article VIII, which was already adjudicated by the state courts. Therefore, the complaint in the instant case should have been dismissed. *Paul v. Dade County*, 419 F. 2d 10 (5th Cir. 1969), *cert. den.*, 397 U.S. 1065, 90 S. Ct. 1504, 25 L. ed. 2d 686 (1970).

In the event this Court should take issue with this contention, it is submitted that the alleged constitutional challenge is unsubstantial and the complaint should have been dismissed. *Cf.*, *Lackawanna Police Benevolent Assoc. v. Mark L. Balen*, 446 F. 2d 52, 53 (2d Cir. 1971).

This Court, in *Dwen v. Barry*, 483 F. 2d 1126 (2d Cir. 1973), stated, at page 1130:

"... we think there is a substantial constitutional issue raised by regulation of the plaintiff's hair length."

It is submitted that such language leaves an inference with the defendants-appellants that doubts exist on this issue concerning police hair grooming regulations and the raising of hair grooming of police officers to the level of a constitutional issue may very well be disproportionate, especially in cases of sanctions such as disciplinary proceedings for agencies like the police since it is the police and not the courts which before the public must justify the integrity and efficiency of their operations. *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222, 235 (1974).

In addition, if the state courts in *Greenwald v. Frank*, *supra*, have upheld hair grooming regulations on the theory of *People ex rel. Masterson v. French*, 110 N.Y. 494, 499 (1888), that police organizations are para-military or quasi military requiring strict discipline and uniformity of appearance, it is for the state appellate tribunals to overrule this contention. It should not be done collaterally in the federal courts since this would violate the parallelism which exists between our state and federal courts, with the exception, of course, that the Supreme Court of the United

States is the final arbiter for both judicial systems, pursuant to the supremacy clause (Article VI) of the Constitution of the United States. *Martin v. Hunter's Lessee*, 1 Wheat. 304, (1816).

Mr. Justice Holmes said in *McAuliffe v. Mayor, etc., of City of New Bedford*, 155 Mass. 216, 29 N.E. 517-18 (1892):

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. *The servant can not complain, as he takes the employment on the terms which are offered to him.* On the same principle the city may impose any reasonable condition upon holding offices within its control. (Emphasis added.)

The police officer has in a sense entered into a contract with a municipality and is bound by the implied as well as the express terms of his contract. The hair grooming standards set forth in Rule 22 of Article VIII of the Rules and Regulations of the Nassau County Police Department are not of such dimensions that they are unreasonable as a matter of contract so as to be unenforceable. The plaintiff-appellee clearly has no constitutional right to be a policeman and he is subject to the modest regulation concerning grooming standards which are applicable to him as well as to those police officers similarly situated.

In short, if a police officer does not like his employer's hair length regulations, he should have two choices: cut his hair to conform to the regulations or find another job.

POINT V

Appellants have met the burden of proof by establishing a legitimate state interest in terms of safety, reasonably related to Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department.

At the outset, it should be noted that *Dwen v. Barry*, 483 F. 2d 1126 (1973), indicated that the police commissioner of a county has the burden of establishing a genuine public need for hair grooming regulations (at p. 1131 of the Court's decision). However, the *Dwen* case is distinguishable to the extent it was decided in the context of discipline and not in terms of safety.

Defendants-appellants contend that they have met the burden of proof during the hearings in the case at bar by establishing that Article VIII, Rule 22 is justified by considerations of safety. It is further submitted that the Nassau County Police Department has justified a lawful infringement upon the alleged constitutionally protected right of a policeman to control his own hair style and appearance. *Michini v. Rizzo*, 379 F. Supp. 837 (U.S.D.C. Eastern District, Pa. 1974).

In approaching the matter of safety justification, we must consider the context in which a police officer operates or may be required to operate in the field of law enforcement. The testimony presented by the defendants-appellants referred to herein provides sufficient justification for hair grooming regulations contained in Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department.

The testimony of Inspector William L. McBride, Commanding Officer of the First Precinct of the Suffolk County Police Department, demonstrated that police officers, no matter what their command, may be called upon to wear tear gas masks to fight crime in a supermarket (A.12 through 14). He further stated that a proper seal cannot be maintained by a police officer unless he were reasonably groomed and that a tear gas mask would, therefore, be useless (A.13).

Inspector McBride further testified that police officers are required to assist on occasion fire fighters by going into fires (A.13). Police officers are required to wear gas masks at that time (A.14), and long hair which was

elongated or hair protruding from the gas mask would create a fire hazard (A. 14). A police officer's job often requires that he go in and preserve life at the scene of a fire and, in the event he reaches the scene of a fire before the fire department, he is authorized to proceed into the scene of the fire with the equipment that he has available (A. 15).

Inspector McBride further testified that in a high speed chase in an attempt to arrest a felon, a policeman's long hair would not only create a hazard for himself if his hair was blowing back and forth across his face, but it would interfere with the proper use of the highway and thus would create a hazard for other motorists (A. 17).

On cross examination, Inspector McBride stated that the wearing of the gas mask would probably interfere with the adoption of a goatee because you cannot get a proper facial seal around the chin area (A. 34 and 35).

The plaintiff-appellee failed to attack Inspector McBride's testimony on the issue of safety and concentrated on the areas of discipline and morale, thus leaving Inspector McBride's testimony unblemished and uncontroverted on the record.

Captain Robert Carney, Commanding Officer of the Special Service Bureau, testified on direct that gas masks are distributed throughout the eight police precincts and that there are forty masks in each police precinct. In addition, the Crime Prevention Unit has one hundred twenty five belonging to this unit (A. 146 and 147). Captain Carney stated that long sideburns, a mustache, goatee or beard prevent a proper seal when wearing a Scotpack or tear gas mask (A. 149). He also stated that the masks in use by the Police Department of Nassau County require a complete seal and the seal cannot conform to hair on the face (A. 149 through A. 158).

Captain Carney further said that not only the Crime Prevention Unit but local precincts have to stand by with their masks ready for use (A. 157 and 158).

On cross examination, plaintiff-appellee failed to rebut appellants' contention that a complete seal is required by the police when using a tear gas mask or Scotpack and that a growth of hair or beard prevents an absolute tight seal.

Deputy Chief Inspector Vincent Redican, an expert in judo, testified that police officers with long hair would be at a severe disadvantage in subduing a criminal if the police officer was grabbed by the hair (A. 88). On cross examination, the only point made by plaintiff-appellee was that Inspector Redican could offer no examples of a criminal getting the better of a police officer as a result of hair pulling (A. 105 and 106).

Chief Inspector Herman Maickel, on cross examination, testified that in addition to the appearance of police officers, safety for the men played a role in the promulgation of the Nassau County Police Department's hair grooming regulations (A. 146 and 147). In support of this, the testimony of First Deputy Police Commissioner James R. Ketcham that the primary considerations for the hair grooming regulations were appearance and the safety factor (A. 151 and 152). He also stated that gas masks carried by the Crime Prevention Unit were not strictly for use by these men exclusively (A. 226). The use of the tear gas masks and the Scotpacks are taught to all police recruits and it is included in recruit training. The thrust of Judge Mischler's memorandum decision on this particular subject at A. 504 and 505 leaves one with the mistaken impression that gas masks are assigned to the Crime Prevention Unit only. The evidence indicates that the masks are stored and available in every police precinct in the County of Nassau for the use of all police officers when required.

Chief Inspector Herman Maickel (A. 488), gave the Nassau County Police Department statistics from all commands (A. 491) which indicated that gas masks or Scotpacks were actually used forty one times out of 80 times when they were brought to the scene (A. 490) during a seven year period or about once every two months. This information applied only to the uniformed forces which

excludes the Crime Prevention Unit, a non-uniformed unit. The statement of the District Court in its memorandum decision (A. 505).

"However, defendants were unable to cite a single instance in which a member of the force (not part of the Crime Prevention Unit) was required to use the gas mask".

appears to be in error. Chief Inspector Maickel indicated that the Nassau County Police Department has utilized the Scotpacks or gas masks in serious or potentially serious circumstances, whether they be in the removing of cadavers, searches, gas or chemical overflows, and thus presenting a very real concern for the safety of police officers as well as the public (A. 492, 493).

It should also be noted that the report from the American National Standards Institute was introduced into evidence as defendants-appellants' Exhibit B in evidence (A. 155, 156). This report discussed facial mask leakage due to excessive facial or other long hair and was uncontroverted.

In lieu of producing Carl W. Irwin of Bangor, Maine, both sides stipulated that if he were called to testify, he would testify that any hair on the face would interfere with proper sealing in the use of gas masks or Scotpacks (A. 306).

The logical conclusion adduced by the testimony and the facts in this case is that Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department is fully justified by safety considerations and the defendants-appellants have met the burden of proof by demonstrating a legitimate state interest.

POINT VI

Article VIII, Rule 22 of the Rules and Regulations of the Nassau County Police Department is not unconstitutionally vague.

On May 14, 1974, Police Officer McCune was accused of having violated Article VIII, Rule 22 of the Rules and Regulations of the Police Department, Nassau County (A. 21). The Charges and Specifications are dated July 3, 1974. At the time of the alleged violation on May 14, 1974, Article VIII, Rule 22 found at A. 31 and teletyped Order No. 114, dated April 23, 1971 (A. 26) were in full force and effect. Subsequently, the Police Department, on May 24, 1974, amended Article VIII, Rule 22 by amending the paragraph in the rule on hair cuts which is quoted herewith:

"ARTICLE VIII

Rule 22, Personal Appearance

Haircuts - Hair shall be neatly cut and trimmed at all times while on duty. Hair styles shall be conservative and not excessive in length. A member's hair shall not be so long or thick so as to touch or extend beyond the ears nor shall the hair be so long or thick so as to touch or extend beyond the collar of the shirt or outerwear."

It is submitted that Article VIII, Rule 22 is not unconstitutionally vague. Defendants-Appellants adopt the case law and its interpretation on this issue found in *Michini v. Rizzo*, 379 F. Supp. 837, pp. 849, 850 and 851.

CONCLUSION

The judgment of the lower Court should be reversed.

Respectfully submitted,

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